

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	WC Docket No. 11-42
Lifeline and Link Up Reform and	)	
Modernization	)	
	)	
Telecommunications Carriers	)	WC Docket No. 09-197
Eligible for Universal Service	)	
Support	)	
	)	
Connect America Fund	)	WC Docket No. 10-90

**NATIONAL LIFELINE ASSOCIATION PETITION FOR DECLARATORY RULING**

Pursuant to section 1.2 of the Federal Communications Commission's (Commission's) rules,<sup>1</sup> the National Lifeline Association<sup>2</sup> (NaLA) respectfully submits this Petition for Declaratory Ruling (Petition) that Lifeline eligible telecommunications carriers (ETCs) are permitted to seek reimbursement for all Lifeline eligible subscribers served as of the first day of the month pursuant to sections 54.407(a) and 54.405(e)(3) of the Commission's rules, including those subscribers that are in an applicable 15-day cure period following 30 days of non-usage.

**I. BACKGROUND**

The Lifeline program requirements related to subscriber usage, the cure period, and ETC reimbursement, are set forth in sections 54.405(e)(3) and 54.407 of the Commission's rules. For purposes of this Petition, the relevant language of these rules currently states as follows:

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<sup>1</sup> See 47 C.F.R. § 1.2.

<sup>2</sup> NaLA is the only industry trade group specifically focused on the Lifeline segment of the communications marketplace. It supports eligible telecommunications carriers (ETCs), distributors, Lifeline supporters and participants and partners with regulators to improve the program through education, cooperation and advocacy. See <https://www.nalalifeline.org/>.

- Section 54.407(a) – Universal service support for providing Lifeline **shall be provided** directly to an eligible telecommunications carrier **based on the number of actual qualifying low-income customers it serves directly as of the first day of the month.**<sup>3</sup>
- Section 54.405(e)(3) – [I]f a Lifeline subscriber fails to use, as “usage” is defined in §54.407(c)(2), for 30 consecutive days a Lifeline service ..., an eligible telecommunications carrier must provide the subscriber 15 days’ notice, using clear, easily understood language, that the subscriber’s failure to use the Lifeline service within the 15-day notice period will result in service termination for non-usage under this paragraph.
- Section 54.407(c)(2) – After service activation, an eligible telecommunications carrier shall only continue to receive universal service support reimbursement for such Lifeline service provided to subscribers who have used the service within the last 30 days, or who have cured their non-usage as provided for in §54.405(e)(3).

The purposes of the reforms to sections 54.407 and 54.405 were twofold. In 2015, the Commission established the uniform “snapshot” date for calculating reimbursement requests, finding that it would enhance administrative efficiencies in the program for both ETCs and the Universal Service Administrative Company (USAC).<sup>4</sup> The Commission further revised the non-usage rules in 2016, with a central goal of making it easier for consumers to remain connected with their Lifeline service.<sup>5</sup>

To clarify the interplay between these provisions, in late 2016 counsel for numerous ETCs approached the Wireline Competition Bureau (Bureau) to confirm that subscribers who are in the 15-day cure period on the first day of the month should be included on an ETC’s reimbursement

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<sup>3</sup> The requirement for ETCs to use a uniform “snapshot” date to request reimbursement from USAC for the provision of Lifeline support was established in 2015. *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶¶ 238-243 (2015).

<sup>4</sup> *See id.*

<sup>5</sup> *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, ¶¶ 411-415 (2016) (2016 Lifeline Modernization Order) (the Commission sought to “ease consumers’ ability to show their desire to retain Lifeline service” by allowing them to demonstrate “usage” by sending a text message or using broadband data).

request for service provided during the prior month pursuant to section 54.407(a) of the Commission's rules. The Bureau explained in informal guidance that such subscribers should be included on a reimbursement request. USAC, in turn, published the same guidance on its website. Specifically, USAC's guidance stated "[s]ervice providers must provider [sic] eligible subscribers with service during the cure period and *may include subscribers in the cure period in their monthly snapshot.*"<sup>6</sup> ETCs have relied on this rational interpretation of the rules for more than a year for purposes of calculating their Lifeline reimbursement requests.

Without a rule change or any formal guidance or rule interpretation from the Commission, USAC recently revised the guidance on its website. It still states "[s]ervice providers must provider [sic] eligible subscribers with service during the cure period." However, it now follows that sentence with the contradictory statements that "[s]ervice providers may not request reimbursement for customers who are in the cure period. If a customer uses their Lifeline-supported service during the cure period and remains enrolled in the program, service providers can adjust the previous month's claims to include those subscribers."<sup>7</sup> USAC did not provide any explanation for or formal announcement of this change, including at its most recent Lifeline webinar during which USAC staff explained the "U codes" for omitting subscribers from a reimbursement request in the new Lifeline Claims System.<sup>8</sup>

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<sup>6</sup> A screenshot of the page on USAC's website where this language was located is attached as an Exhibit.

<sup>7</sup> USAC, "De-Enroll Ineligible Subscribers," available at <http://www.usac.org/li/program-requirements/de-enrolling/> (last viewed Feb. 5, 2018).

<sup>8</sup> Slide 12 presented during USAC's webinar notes that one of these "U codes" directs ETCs to omit a consumer from a reimbursement request if the "[s]ubscriber is in a non-usage cure period (snapshot date falls within the 15-day cure period)." See USAC, "New Reimbursement Claims Process (Lifeline Claims System) & Changes to the FCC Form 555," Lifeline Program Update (Jan. 10, 2018). However, there was no meaningful discussion of the individual "U codes" during the webinar.

USAC's revised guidance is a 180 degree reversal in the interpretation and implementation of the Lifeline program rules. As explained herein, USAC's prior guidance that instructed ETCs to include on their reimbursement requests subscribers who are in a cure period on the snapshot date is the only reasonable interpretation of the rules. Moreover, USAC lacks the authority to change the interpretation provided by the Bureau and reflected in its initial guidance in the absence of a change in the rules. Finally, Commission endorsement of the new guidance would be arbitrary and capricious because it would ignore the directive set forth in section 54.407(a) of the Commission's rules and disregard ETCs' reasonable reliance on the initial guidance. It also would be the antithesis of good public policy because it would increase program costs and would require a waiver of the current requirement to provide service during the cure period to avoid a potentially unconstitutional taking. Accordingly, the Commission should order USAC to return to the previous rational and fair interpretation of the rules.

## **II. THE PRIOR GUIDANCE ALLOWING ETCs TO CLAIM SUBSCRIBERS DURING A NON-USAGE CURE PERIOD IS THE ONLY REASONABLE INTERPRETATION OF THE RULES**

Section 54.407(a) of the Commission's rules clearly states that "[u]niversal service support for providing Lifeline **shall be provided** directly to an eligible telecommunications carrier **based on the number of actual qualifying low-income customers it serves directly as of the first day of the month.**"<sup>9</sup> Taken together with section 54.405(e)(3), which provides for a 15-day cure period after 30 days of non-usage before service termination, any subscriber who happens to be in a cure period on the first day of the month is clearly an "actual qualifying" customer for which the ETC "shall" receive universal service support. Thus, the initial guidance that instructed ETCs to include these subscribers on their reimbursement requests was correct. To be sure, it was the only

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<sup>9</sup> 47 C.F.R. § 54.407(a).

interpretation that rationally effectuated the interplay between two rules – reimbursements pursuant to 54.407(a) and the requirement to continue service during the cure period implicit in 54.405(e)(3).

Additionally, the previous guidance was consistent with the core objective of the 2016 revisions to the non-usage rules, which was to make it easier for consumers to remain connected with their Lifeline service by expanding the means through which consumers could demonstrate “usage” of their Lifeline service.<sup>10</sup> In doing so, the Commission acknowledged “the reality that many consumers today view texting, voice, and broadband as interchangeable means of communication and often use text messages as the sole or primary means of communication. Many Lifeline subscribers may assume that using any of the services available from the device provided by their Lifeline service provider will qualify as usage, and it seems unnecessarily burdensome to require them to distinguish among the services to ensure compliance with the program’s usage requirement.”<sup>11</sup>

Moreover, the USAC guidance implicitly acknowledged that there are certain per-subscriber costs associated with providing Lifeline service for which it is appropriate for ETCs to be reimbursed as long as they continue to make the service available to these subscribers, and ETCs have relied on this reasonable interpretation of the rules for more than a year for purposes of calculating their Lifeline reimbursement requests. Thus, NaLA respectfully submits that the Commission should direct USAC to rescind its new guidance and return to the previous interpretation of the rules which are unchanged.

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<sup>10</sup> See 2016 Lifeline Modernization Order ¶¶ 411-415.

<sup>11</sup> *Id.* ¶ 414.

### **III. USAC’S REVISED GUIDANCE REGARDING REIMBURSEMENTS DURING THE CURE PERIOD IS UNLAWFUL**

USAC’s limited role as a program administrator underscores the need for the Commission to intervene in this instance. As the Commission’s rules make clear, USAC does not have the authority to interpret or issue legally binding determinations regarding the Commission’s Lifeline program rules. Specifically, section 54.702(c) of the Commission’s rules states that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”<sup>12</sup> Indeed, the Commission previously has reversed decisions by USAC that have been rendered in the absence of a formal interpretation by the Commission of its rules.<sup>13</sup>

Pursuant to this clear limitation of USAC’s authority, if the Commission’s rules are conflicting or unclear, USAC is not permitted to determine how to resolve the discrepancy or ambiguity. Rather, it is required to seek guidance from the Commission. In this case, to the extent that the service and reimbursement provisions set forth in sections 54.405(e)(3) and 54.407(a) and (c) of the Commission’s rules are conflicting regarding whether ETCs may seek reimbursement for subscribers who are in a cure period on the first day of the month, it was improper for USAC to provide the new guidance to ETCs without formally consulting with the Commission.<sup>14</sup> Moreover,

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<sup>12</sup> 47 C.F.R. § 54.702(c).

<sup>13</sup> See, e.g., *Request for Review by InterCall, Inc., of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, FCC 08-160 (2008) (reversing USAC’s decision requiring InterCall to retroactively amend its Universal Service Fund contribution amounts “because of the lack of clarity regarding the direct contribution obligations of stand-alone audio bridging service providers”).

<sup>14</sup> As noted above, USAC revised the guidance on its website without any change in the Lifeline program rules. There is no publicly available document indicating that USAC consulted with or sought guidance from the Commission before making the change. Surely, when guidance involving unchanged rules changes completely, the process for arriving at the change should be transparent

because the proper interpretation set forth in the prior guidance is well settled and accepted, USAC cannot now pronounce a completely contrary interpretation of the rules. Lifeline ETCs followed the original Commission and USAC guidance because it is consistent with the only rational interpretation of the rules and the fundamental underpinning of the Lifeline program that ETCs should receive reimbursement for subscribers served. USAC cannot reverse its guidance and remain consistent with the requirements of sections 54.407(a) and 54.405(e)(3) without a rule change.

**IV. IF THE COMMISSION INTERPRETS THE RULES CONSISTENT WITH USAC'S NEW GUIDANCE, SUCH A DECISION WOULD BE ARBITRARY AND CAPRICIOUS AND OTHERWISE UNLAWFUL**

The Commission must take corrective action in response to USAC's unlawful attempt to revise the guidance regarding reimbursement for Lifeline subscribers during the cure period. NaLA respectfully submits that the Commission should direct USAC to implement the rules in accordance with the previous guidance because a Bureau decision to ignore its previous interpretation would be arbitrary and capricious in violation of the Administrative Procedure Act.<sup>15</sup> Indeed, such action would (1) ignore ETCs' well-established and reasonable reliance on the previous guidance, (2) disregard Commission rules that clearly authorize reimbursement for subscribers who are in a cure period, (3) harm consumers and increase Lifeline program costs, and (4) require a waiver of section 54.405(e)(3) in order to avoid a potential unconstitutional taking.

Commission endorsement of USAC's new guidance would be arbitrary and capricious in light of ETCs' reliance on the (only) rational interpretation that allowed for reimbursement requests which included subscribers in a cure period. When interpretation of agency rules or policy changes,

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and subject to public comments and judicial review. Anything less calls into question the stewardship of the Universal Service Fund by the Commission and USAC.

<sup>15</sup> See 5 U.S.C. § 706(2)(A).

the agency must at a minimum “acknowledge and explain the reasons for a changed interpretation.”<sup>16</sup> The need for an adequate justification for a policy change is particularly important when a “prior policy has engendered serious reliance interests that must be taken into account.”<sup>17</sup> Indeed, as the Ninth Circuit has observed, “agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy.”<sup>18</sup> In this case, even if the Commission attempted to justify and direct USAC to enforce the new guidance, ETCs relied on the initial guidance when completing their reimbursement requests for more than a year, and the guidance was never subject to dispute, so ETCs had no reason to believe that it might be reversed at any time.<sup>19</sup> Accordingly, changing the interpretation at this time would be arbitrary and capricious.

Perhaps most importantly, the new guidance seemingly relies solely on the ambiguous language in section 54.407(c)(2). It wholly disregards the directives set forth in sections 54.407(a) and 54.405(e)(3), which make clear that any eligible subscriber who is receiving Lifeline service on the first day of the month – whether or not that subscriber happens to be in a cure period at that time – is an “actual qualifying” customer for which the ETC “shall” receive universal service support. The Commission, and USAC by extension, cannot effectuate a policy change by simply ignoring these provisions of the rules. Moreover, choosing to interpret potentially conflicting rules to

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<sup>16</sup> See *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014), citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not ... depart from a prior policy sub silentio or simply disregard rules that are still on the books.”) and *NCTA v. Brand X Internet Svcs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”).

<sup>17</sup> *Fox*, 556 U.S. at 515.

<sup>18</sup> *City of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984).

<sup>19</sup> *Contra Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110-11 (D.C. Cir. 2001) (in that case, the court determined the parties had no reasonable basis to rely on FCC decisions that “were under unceasing challenge before progressively higher legal authorities”).

prohibit ETCs from seeking reimbursement to which they are entitled under the rules for services made available to eligible Lifeline subscribers would be fundamentally unfair. If the Commission's rules compel the provision of service, it should not deny ETCs the right to be reimbursed for providing such discounted service.

Additionally, reversing course could not be adequately justified because it will harm consumers and increase program administrative costs. In particular, the new guidance may impact the affordability of Lifeline service for consumers. If ETCs are not permitted to seek reimbursement for services rendered during the cure period, they will have difficulty maintaining current service offerings for consumers. Moreover, improperly prohibiting ETCs from seeking support during an initial reimbursement request for services made available to certain subscribers during the cure period, and directing ETCs instead to "adjust the previous month's claims to include those subscribers" all but guarantees that ETCs will submit more upward adjustments to their reimbursement requests. This increase in "paperwork" will increase program costs by requiring USAC and ETCs to expend additional time and resources to prepare and process these adjustments.

Finally, if the Commission affirms USAC's reversal – which it should not – it must provide ETCs a waiver of the requirement to provide service during the cure period set forth in section 54.405(e)(3) so that ETCs can terminate service to subscribers after 30 days of non-usage since they may not be reimbursed.<sup>20</sup> Otherwise, requiring ETCs to provide service to subscribers during the cure period without reimbursement could constitute an impermissible "taking" pursuant to the Fifth Amendment of the U.S. Constitution.<sup>21</sup> Notably, subscribers would remain enrolled in Lifeline for

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<sup>20</sup> NaLA respectfully submits that such a waiver would be consistent with the "good cause" standard set forth in section 1.3 of the Commission's rules as requiring ETCs to provide service without reimbursement would be fundamentally unfair. *See* 47 C.F.R. § 1.3.

<sup>21</sup> U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

the full cure period and would then still be able to call 911 for emergencies or could cure by calling 611 for customer service and have their service restored, but they would most likely lose their phone number, which would significantly disrupt the ability of employers, schools, health care providers, and family members, to stay in contact with these subscribers.

Accordingly, the Commission should continue to allow ETCs to receive reimbursement for all subscribers served as of the snapshot date, rather than impermissibly, arbitrarily and capriciously reversing course to the detriment of those consumers for whom the program is intended to provide a hand toward rising out of poverty. By directing USAC to restore the longstanding guidance, the Commission also will avoid imposing additional burdens and expense on itself, USAC and ETCs.

## **V. CONCLUSION**

For the foregoing reasons, the Bureau should grant this Petition and declare that Lifeline subscribers who are in a non-usage cure period on the snapshot date are eligible to receive reimbursement for services made available to them as of that date.

Respectfully submitted,

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# EXHIBIT



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## DE-ENROLL INELIGIBLE SUBSCRIBERS

If a subscriber becomes ineligible for the Lifeline Program, they have an obligation to contact their service provider directly and de-enroll from the Lifeline-supported service.

There are several other situations that might result in a subscriber being de-enrolled from discounts:

1. If a telecommunications carrier has a **reasonable basis to believe** a subscriber is no longer eligible, the carrier will send the subscriber a notice of impending termination. The subscriber has 30 days from the date of the impending termination letter to demonstrate continued eligibility by re-certifying his or her continued eligibility (47 C.F.R. Section 54.405(e)(1), 54.410(f)(2)(iii), 54.410(d)(3)).  
  
A carrier that provides Lifeline Program-supported service must terminate service for any subscriber who fails to demonstrate continued eligibility within the 30-day time period (47 C.F.R. Section 54.405(e)(1)).
2. If USAC, the administrator of universal service, provides notification to a telecommunications carrier that a subscriber has **more than one discounted account**, or that more than one member of a subscriber's household is receiving service, the telecommunications carrier must de-enroll the subscriber within five business days (47 C.F.R. Section 54.405(e)(2)).
3. Starting December 2, 2016, subscribers receiving a free Lifeline-supported service must use their service at least every 30 days. Service providers must notify subscribers who do not use their service at least every 30 days that they will be de-enrolled if they do not use their service during the 15-day notice period (the "cure period").

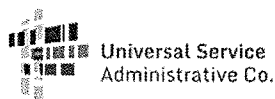
Service providers must provide eligible subscribers with service during the cure period and may include subscribers in the cure period in their monthly snapshot.

4. Subscribers have an obligation to re-certify annually that only one member of their household receives program-supported service and they continue to be eligible.

If a subscriber **fails to respond** to a telecommunications carrier's request for certification, the telecommunications carrier must provide the subscriber with notification that the subscriber has 30 days from the date of the notification to provide the requested certification.

If the subscriber fails to provide the requested certification within the 30-day notification period, the telecommunications carrier must de-enroll the subscriber from program-supported service within five business days from the end of the 30-day notification period (47 C.F.R. Section 54.405(e)(4)).

\*Beginning with rolling recertification in 2017, subscribers will have 60 days to respond to the carriers' recertification request/termination notice.



The Universal Service Administrative Company (USAC) is dedicated to achieving universal service. As a not-for-profit corporation designated by the Federal Communications Commission (FCC), we administer the \$10 billion Universal Service Fund. With the guidance of the FCC policy, we collect and deliver funding through four programs that are focused specifically on places where broadband and connectivity needs are acute.

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